PIOUS MANAMIKE
and
ETENAL RESOURCES (PRIVATE) LIMITED
versus
PROSECUTOR- GENERAL

HIGH COURT OF ZIMBAWE
CHIKOWERO J
HARARE, 15 & 27 June 2023

Opposed application

T K Hove with T Mandizvidza and N S Mkombachoto, for the applicants
M F Mutamangira, for the respondents

CHIKOWERO J:

1. This is an application brought in terms of S 29(1)(a) of the High Court Rules, 2021 for the rescission of an order of this Court on account of the order having been erroneously sought or erroneously granted in the absence of parties affected thereby, being the applicants.
2. The impugned order was granted pursuant to an *ex parte* chamber application made in terms of S 47(1) (b) of the Money Laundering and Proceeds of Crime Act [Chapter 9:24]("the Act")
3. This Court in Njanji and Ors v Prosecutor – General and Ors HH 237/23 struck off the roll an application similar to the present. It did so on the basis that an application brought in terms of S 47 (1) (b) of the Act is a criminal proceeding. That being the case, an order granted in a criminal proceeding cannot be varied in civil proceedings, namely in a S 29 (1) (a) application.
4. To similar effect is the matter of *Manyonga and Anor* v *Prosecutor General and 2 ors* HH 333/23 although the order sought to be rescinded in that matter was an interdict granted pursuant to an application filed in terms of SS40 and 41 of the same Act.

5. In light of Njanji and Manyonga (supra),1 directed Counsel for the parties to file supplementary heads of argument to address the issue of whether the present application was properly before the court.
6. I am indebted to Counsel for the main, supplementary heads of argument and oral submissions.
7. Mr Mandizvidza referred me to the South African position. I observe indeed that S 13 (1) of the Prevention of Organised Crime Act No 121 of 1998 (POCA) provides that proceedings for an application for a restraint order, for purposes of Chapter 5 of POCA, are civil in nature although that chapter deals with the criminal regime of recovery of proceeds of crime.
8. I note too that S 37 (1) of POCA clearly states that for purposes of that Chapter, all proceedings under the Chapter are civil proceedings and not criminal proceedings. Chapter 6 deals with the civil regime of recovery of proceeds of crime.
9. Mr Mandizvidza then referred me to the case of National Director of Public *Prosecutions* v *Booysen and* Ors 6171/21, a judgement of the South African High Court Western Cape Division, wherein the Court dealt with an application for discharge or variation of a restraint order as a civil proceeding.
10. It was on the basis of the law in South Africa, which Counsel said was clear and our own legislation, which he contended was ambiguous, that he urged me to find that the application brought in terms of S 47 (1) (b) of the Money Laundering Act was a civil proceeding.

    In the latter respect I note that although the entire Chapter IV of the Money Laundering Act deals with the conviction- based regime of recovery of proceeds of crime, S 38(4) of the Act, which deals with the application of Chapter IV, reads as follows:

    > " 38(4) Any question of fact to be decided by a Court on an application under this Chapter is to be decided on a balance of probabilities"

This is the civil standard of proof. The lowering of the standard of proof is consistent with the over- arching purpose of the statute as a whole, namely to make it easier to recover proceeds of crime. It is not an aberration in this jurisdiction that a court exercising criminal jurisdiction can determine some issue in those proceedings on the civil standard of proof, namely on a balance of probabilities: See S 18 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In context it reads:

" PART IV
Proof of Criminal liability
18 Degree and burden of proof in criminal cases.
(1) Subject to subsection (2) no person shall be held to be guilty of a crime in terms of this Code or any other enactment unless each essential element of the crime is proved beyond reasonable doubt.
(2) Subsection (1) shall not prevent any enactment from imposing upon a person charged with a crime the burden of proving any particular fact or circumstance.
(3) Where this Code or any other enactment imposes upon a person charged with a crime the burden of proving any particular fact or circumstance, the person may discharge the burden by proving that fact or circumstance on a balance of probabilities".

See also SS 50 and 54(1),(2) and 3 of the Money Laundering Act.

11. I am satisfied that S38(4) of the Money Laundering Act, in the context of the entire piece of legislation, was not intended by the lawmaker to mean that a s 47 (1) (b) application is a civil proceeding. To hold otherwise would be to render nugatory not only s 83 (1) (b) of the Act but the whole of Chapter V. S 83 reads:

"83. Property Seizure order under Part 1 of Chapter V
(1) The Court may on application by the Prosecutor – General, make an order in conformity with Sub- section (6) (called a " property seizure order") to search for and seize specified property that is the subject of a property freezing order, if the court is satisfied that-
(a)…
(b) there is a reasonable suspicion of risk of dissipation or alienation of the property if the order is not granted"

What is envisaged here is the making of an application for a non – conviction based property seizure order. Put differently, it is S 83 (1) (b), which falls under a different Chapter, namely Chapter V, which provides for a civil application for a property seizure order.

12. I still hold the view expressed in *Njanji and Ors* v *Prosecutor General and Ors (Supra)* that the advertence by the Prosecutor- General, in the main application, to his alternative cause of action being founded on S 83(1) (b) of the Act, was a red herring.
13. That the Prosecutor General's representative had to attach a service dispensation certificate to the founding affidavit in the main application (which is provided for in terms of S 60(4)(b) of the High Court Rules, 2021, as if the application itself was a civil proceeding) could only have been on account of there being no rules of procedure for applications under the Money Laundering Act outside those procedures set out in the Act itself. Having availed himself of the provisions of S 60 (4) (b) as the default rule to justify why he had not served copy of the main application on the respondents, I am not persuaded that the first respondent's use of the service

dispensation certificate means that the nature and substance of the application was, as a result, a civil proceeding, not a criminal proceeding.

14. The present application is not properly before me. The provision under which it is brought does not apply to criminal proceedings.
15. As for costs of suit, I agree with both Mr Hove and Ms Mutamangira that local jurisprudence in this area is still developing and that, whatever the outcome of the application, there be no order as to costs.
16. In the result, IT IS ORDERED THAT :
    1. The application be and is struck off the roll
    2. Each party shall bear its own costs.

TK Hove and Partners, applicants, legal practitioners
The National Prosecuting Authority, 1st respondent's legal practitioners